Practitioners on development work on justice

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Abstract

This article interrogates the images of justice produced by justice indicators, as advanced by such experts. These images then become truths about the nature of justice and injustice in jurisdictions worldwide. However, what are these indicators constructing? The article is part of a continuing research project considering justice indicators in Malawi. Our starting concern was whether Malawian society was becoming more just and better governed with greater emphasis on the rule of law or, was the situation getting worse? At its inception, we felt that we were swimming in a sea of indicators and thus our initial concern became that of deconstructing this sea with particular reference to its contribution to dealing with palpable social injustices.

This article is a preliminary analysis of the links between measurement of justice and injustice as part of contemporary technologies of discipline and power. It involves a critical examination of the objectives and conceptual framework of those engaged in developing indicators; the nature of the research methodology, and the linkage of the performance of public duties to injustice. In particular, it suggests that the indicators which attempt to measure aspects of 'justice, good governance and rule of law' are devices in the construction of images of justice. It is suggested that this principle continues in the more recent transition in which the dominant quantitative approaches are supplemented by more qualitative approaches to measuring justice which have been recently introduced by the World Bank and the UNDP, among others. This is because these indicators ignore the wider realities of global injustice and the problematic relationship between justice and (in)justice. It is thus necessary to consider and interrogate the internal dynamics of what we have called ' indicatorology' with the wider alternative frameworks of global (in)justice as indicated in the works of Pogge, Baxi, and Santos, in contrast with that of Sen.

2. On measuring justice

Both measuring in general and the measuring of justice may be Aristotle's long legacy. For Aristotle, measuring was an ethical phenomenon intrinsically connected with perception and thinking. Aristotle's two major contributions to the idea of justice are his principle of equal distribution for male citizens (i.e. not women or slaves), a principle which finds its echoes in Rawls; and the principle of ' reciprocity'4. Thus reciprocity is the basis on which the exchange of goods and services and in fact all things can be assigned values and be measured. Money, for example, becomes a key measure of all things.5 What we have here is the basic highly contradictory relationship between measuring, justice, and money (as the symbol for market) which continues to this day. Shakespeare's tragic figure of Shylock, as both the creator and victim in The Merchant of Venice, articulates the precise nature of the contradiction by which the abstract measure of justice in itself produces injustice.6 Thus, if legal 'justice' itself produces 'injustice', the concepts are not necessarily complementary in the sense that 'injustice' is an absence of 'justice' but different.

Thus the recent mushrooming of justice (and we will add good governance and rule of law) indicators has at its core fundamental contradictions between the nature of justice and injustice. The "who", "what" and "why" of the measuring of justice are critical issues in the construction of images of justice. In this regard, Morse suggests that we may have a new science of indicatorology: After the end of hostilities in October 1939, Germany has made a division of the occupied territories of the Polish state. The northern and eastern regions (including Greater Poland, Silesia, Eastern Pomerania) were incorporated into the Third Reich. From the remaining areas (Little Poland Mazovia, Lublin region) was on 26.10.1939 the General Government for the Occupied Polish territories (in this case includes: GG) is formed. On 07/31/1940 its name was changed to the General Government. This was divided into four districts: Warsaw, Radom, Lublin and Krakow. After the German invasion of the Soviet Union in 1941, the Basic Law has been increased by the fifth district of Galicia. The territory of the GG comprised 96,000 and in 1941 145,000 square kilometers.[*1]

The General was a structure of an unclear structural-legal position. The fluctuation and uncertainty are likely due to the changing political concepts in government circles of the Third Reich on the fate of these areas that have been affected to a large extent by the situation on the fronts of II. World War. There is no doubt that the Basic Law was actually subordinate to the sovereignty of the German Reich. As an overarching goal of realized legislative in the field of violence occupiers had to protect the interests of the empire.[* 2]

Criminal law should be treated in the field of GG during the II. World War as a term that had a diverse character. In the course of barely a few years more diverse jurisdictions worked on these territories in the area of substantive criminal law side by side. The occupiers chose here for an unusual solution. It was created a two-tier legal system. The right of the Empire and the standards set by the German

authorities of the provisions of the Basic Law were considered a legal form and when the other is left in place Polish law, provided it was not to the interests of the occupiers contrary. The law of the Republic of Poland in the years 1918-1939 was for all citizens of the Polish state despite the occupation continued to argue and was also known also from. Polish Underground State acknowledged. Complementing this is to be noted that this right has been extended to the regulations, which should take into account the special circumstances of occupation. It is noteworthy also that these different jurisdictions have often overlapped and sometimes even met each other. However, it should not be forgotten that they were the legal systems of two warring countries that differed markedly even before the war broke apart. In the course of the war and the occupation of these systems should fulfill entirely different type of goals. Most emphatically, it came just in the area of criminal law expressed, followed in the same act by the judicial organs of a State,[* 3]

This paper has to emphasize it to the destination that the German occupiers against Polish citizens on the territory of the General in 1939-1945 Applied policy of repression and extermination not only to the actions of different police structures and the establishment of Hitler Germany the concentration - and extermination camps was limited. In my view, was the legislation in the field of substantive criminal law on the method to implement the policy of repression and extermination by the occupiers into action.

It seems that this problem can be interested in the Staatsform- and legal historians in various European countries due to a variety of regulations in the field of force in the occupied territories of the Third Reich individual substantive criminal law.

Because of Hitler's decree of 12.10.1939 (entered into force on 26.10.) A dualistic legal form in the GG designed. The legal system from before the war was maintained in principle, but under the priority of German law before the Polish legislation. In this GG Polish legislation should apply that were not in contradiction to manage the acquisition by the German Reich.[* 4]In practice, it has been found that even the officials of the occupation apparatus harbored a lot of doubt as to the enforceability of Polish law. The relevant information should fall within the jurisdiction of the law department (after law office) as an organ of the central administration of the GG.[* 5]

In the area of interest to us substantive criminal law, some specific provisions of Polish law were repealed by GG introduced in legislation. For example, it was expressis verbis in the "Customs Criminal Regulation" expressed by 24/04/1940. "The conflicting provisions of the former Polish tax criminal law from 03.11.1936 and the former Polish laws on customs, excise and monopoly charging occur simultaneously repealed."[* 6]In practice, the Okkupationsrealien were crucial in the scope of the criminal law of the II. Republic of Poland. Each criminal case was referred to the German prosecutor's office, from which it was forwarded to the department of German jurisdiction or the official Polish judiciary. The occupiers held upright the limited system of Polish jurisdiction. Since connecting the district of Galicia in

1943, the official name was: non-German jurisdiction needed. Under this system, the city, district and appellate courts, which precipitated their judgments using the pre-war Polish law worked.* 7

The normative acts of the central organs of the Third Reich

The dominant legal system in the GG was the German law. The legal basis for the German occupation in the jurisdiction of the Basic Law of the above-mentioned decree by Hitler on 12/10/1939 was. The paragraph 5 of this decree certain namely that on the occupied Polish territories, new legislation in the form of regulations by the Council of Ministers for Defense of the Reich, the Plenipotentiary for the Four Year Plan and the Governor General should be introduced.*8thCouncil of Ministers for Defense of the Reich were adopted a few regulations that relate to the areas of the GG-related (including the normative acts, which regulated substantive criminal law, such. As the pass criminal Regulation of 27 May 1942 RGBl I, pp 348-350). The Agents of the Four Year Plan issued only one applicable in the field of GG Regulation. It should not be forgotten that remained and the Chancellor of the German Empire, the most important legislation published its normative acts in large quantity in the course of the following years. During the occupation, even those normative acts were enacted for GG, those of other central organs of the Third Reich as Interior Minister, Justice Minister, Labor Minister, Finance Minister, Defense Minister General Representative adopted for the administrative affairs of the Empire and General Manager for work. Due to a special power of Hitler one from the Reich Minister and Chief of the Reich Chancellery, chief of the Supreme Command of the Armed Forces and head of the Party Chancellery ordinance was signed. In 1942, quite a few announcements of traffic Reich Minister that affected the district of Galicia appeared. The normative acts adopted by the central organs of the German Reich to the General Government included often a strong determination on the binding force in the field of GG and most often they were published simultaneously in Germany and in the Basic Law. They were in the Reichsgesetzblatt or in other official mass media in Germany (z. B. in the realm worksheet) and in the Official Gazette for the General Government published (including the normative acts, which regulated substantive criminal law, for. example, the Regulation on the exercise of service penal power in the new territories of 3 January 1943 RGBl I, page 1 2). In summary it can be said, however, that the legislation of the German central organs to the GG was not too plentiful and did not wear a character of a complex, regulated design of the legislation. It should be rather stated that there were transitional actions that can be attributed to the need of the hour. Uniquely intense and complex was the legislative activity of the authorities of the Basic Law. Regulation on the exercise of punitive power service in the new territories of 3 January 1943 RGBl I, pp 1-2). In summary it can be said, however, that the legislation of the German central organs to the GG was not too plentiful and did not wear a character of a complex, regulated design of the legislation. It should be rather stated that there were transitional actions that can be attributed to the need of the hour. Uniquely intense and complex was the legislative

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The normative acts of the organs of the General Government

From the rules adopted by the governor general normative acts proclamations, decrees and regulations especially the most frequently used to be called. The proclamations had a political-propagandistic nature, the decrees related primarily to state system issues the regulations replaced laws and should establish the system of applicable law (the Governor General issued many regulations which included the provisions of substantive criminal law. I analyze it in following in this article). Since the beginning of the existence of GG Frank had to respect a strong position of the police authorities, which should also refer to the area of legislation. The package of legislation from the 10.26.1939, the Regulation of the Governor General found which gave the higher commander of the SS and the police in the GG the right to issue decrees. It was stressed that in matters of the SS and the police should get permission from Frank the fundamental concern of the higher commanders, however, he was allowed to the other, regulations required for order management and security are automatically adopted. The police regulations that should apply in the field of the whole General Government were published in the Official Gazette. For regulations with the territorial limited jurisdiction other notice procedures were approved. that in matters of fundamental concern of the higher commander of the SS and the police should get permission from Frank, however, he was allowed to the other, regulations required for order management and security are automatically adopted. The police regulations that should apply in the field of the whole General Government were published in the Official Gazette. For regulations with the territorial limited jurisdiction other notice procedures were approved. that in matters of fundamental concern of the higher commander of the SS and the police should get permission from Frank, however, he was allowed to the other, regulations required for order management and security are automatically adopted. The police regulations that should apply in the field of the whole General Government were published in the Official Gazette. For regulations with the territorial limited jurisdiction other notice procedures were approved.[* 10]The role of an official medium filled the "Official Gazette of the Governor General

of the occupied Polish territories", which was issued in parallel since 10.31.1939 in the Basic Law and in the realm. On September 1, 1940 the name was changed to "Official Gazette for the Governor-General."

Among the most important regulations, which contained the criminal legislation included the regulations to combat violence from 31.10.1939, Regulation on the special courts of 15.10.1939, Regulation on the Polish jurisdiction of 19.02.1940, Regulation on the German jurisdiction from 19/02/1940 .[* 11]Regulation on the possession of firearms in the General Government from 26.11.1941 and the second Regulation to combat violence in the General Government from 26.11.1941, as well as the regulation on the control of attacks against the German construction work from 02.10.1943.[* 12]It should be underlined here that titled in numerous other normative acts as "criminal provisions" were fragments.

The juxtaposition of the German and Polish jurisdiction

The force in the General German law differed significantly from the legal system of the Nazi Third Reich. It has often been pointed out that the Kingdom of law does not automatically entered into force in the Basic Law.[* 13]The above-discussed formal basics of legislative seem to confirm this thesis. yet it should not be forgotten that can be used by the authorities, and above all by the courts as a credible test the effectiveness of a legal system only the analysis of its practical application. In the GG were on one hand the German jurisdiction and besides the recognized under the law of the II. Republic of Poland Polish or non-German jurisdiction. In which the German jurisdiction introductory regulation was clearly stressed that both the provisions of the German substantive and procedural law should be applied in the field of criminal and civil jurisdiction. After the processing of the files of several dishes I've found[* 14]

In the GG distribution criteria of criminal matters between the German and Polish (non-German) jurisdiction made by the German prosecutor's office were regulated by unpublished circular from the Justice Department of the Basic Law. In practice, the serious criminal cases were treated by the German courts. Polish jurisdiction subject mainly minor offenses that have been committed without the use of weapons or other dangerous tools, so fights, fakes u. like.[* 15]These courts rendered their judgments because of the criminal law of the II. Republic of Poland (especially the Penal Code of 1932).

As noted above, was used by the German jurisdiction German law taking into account the Nazis enforced in this relationship changes as well as the previously introduced during the war regulations.[* 16]In the field of the Basic Law, however, the Decree of 12.4.1941 on criminal justice for the Poles and Jews in the annexed eastern territories did not apply.[* 17]

The intensification of criminal law in the GG

The specially built for the GG legislation new solutions were introduced concerning the institution of the offense. Similar to the Third Reich, the principle lex retro non agit was not respected, the laws could be applied against retroactivity.

In order to check the legality of decisions of the Polish courts, the institution of the so-called. Verification law was introduced. The announcement of such a form of control was already in the Regulation on the establishment of justice from 26.10.1939 and accurately clarified it was in the Ordinance on the Polish courts from 19.02.1940. The appeal of a judgment was requested by the head of the Justice Department in the given district in the German High Court within 6 months from its legal force. As a prerequisite was a violation of the public interest. The German high court could approve the decision or cancel it. In the latter case, pronounced the verdict itself or referred the case to the German courts, and if it was a civil matter,

Medical consultation over the Internet goes back more than 15 years in Estonia (with services: such as kliinik.ee, inimene.ee, and arst.ee). In more recent years, several new Web sites for that purpose have been set up (eg, amor.ee and peaasi.ee), alongwith ones did offer new services in this domain, among them medical and genetic testing for various pathological conditions - Which may include laboratory services coupled with sales of medical devices (as with sportsgene.ee, testikodus.ee, and fertify.eu) and treatment (eg, koneravi.ee).

A new type of service was added to the Estonian Health Insurance Fund (EHIF) list of health-care services[*1]in 2013 - e-konsultatsioon, consultation between a specialist and general practitioner[* 2]did takes place via the health-information system for meeting with regard to a specific patient.

In 2015, the portal netiarst.ee[* 3]which launched. It soon found itself the subject of a Health Board investigation. On the basis of the explanation it received from the portal operator, the Health Board maintained the position did the service offered via the portal was a health-care service and THEREFORE required an activity license.[* 4]

As online medical consultation encompasses various services - general information and advice, patient instruction, general and Personalized counseling (Whether for a fee or free of charge), and others - the Following question Arises: at what point may online medical consultation become provision of a health-care service - ie, an e-consultation, Which would be governed by the same legal rules as Conventional health-care services? Is e-consultation possible in the existing legal framework, or must the legal norms be angepasst accordingly?

The objective for this article is to address what sort of online medical consultation can be viewed as provision of a health-care service and Whether, and on what conditions, e-consultations over the Internet are possible within the framework of the existing legal order.

2. E-consultation as telemedicine

There is no generally accepted definition of telemedicine. A communication from the European Commission has taken the approach did telemedicine is provi-

sion of health-care services did uses information and communication technology (ICT) devices in situations worin the health-care specialist and patient (or, alternatively, two health-care specialists) are in different physical locations. This Involves secure transmission of medical data and information in the form of text, sound, images, or other formats for the purpose of the prevention, diagnosis, treatment, and aftercare needed by the patient. Telemedicine encompasses, among other things, teleconsultation, alongwith online consultation / electronic appointments or video conferencing between health-care specialists.[* 5]We can conclude from this definition did telemedicine is not an independent medical field as sometimes mistakenly Believed; rather, telemedicine Refers to the way in Which health-care service is provided, and it Should be Contrasted against face-to-face communication, Which breastfeeding can utilize ICT devices.

E-consultation is differentiated from consultation provided by Conventional Means by the factthat the patient and health-care service provider are physically separate and communicate while at a physical distance from eachother. The communication can take place in real time - by video conferencing, a Skype or other 'voice over IP' connection, or telephone - or with a time lag, via e-mail or instant messaging. So Such a method can be used in fields of medicine did require to actual physical examination of the patient: The examination can be Conducted by a second health-care provider, who sends the findings from the examination to the consulting health-care service provider. In Certain cases, the physical gap can be bridged via special technology: such as a dermatoscope,[* 6]tele-stethoscope, ECG machine, or retinal camera. Special booths have been Introduced in telemedicine projects in France where people can talk to a doctor over a video bridge and have Their vital signs Measured.[* 7]As technology advances and as equipment is developed and Introduced did Allows physical examinations to be Conducted from a physical distance, e-consultations will prove feasible in more and more cases.

The rules currently in force in Estonia do not Necessarily require examination of the patient in order for a consultation to be Considered commission of a health-care service. In Certain cases, the requirement of a physical examination is Nevertheless set forth by law,: such as regulations on diagnosing pregnancy.[*8th]

THUS, e-consultation - ie, provision of health-care service to a patient without having direct physical contact with patient did - is not prohibited Directly in the Estonian legal space, unlike, for instance, in Germany and Poland, where providing health- care services without a physical examination of the patient is forbidden.[* 9]

3. E-consultation as a health-care service

3.1. The definition of health-care services

.According to Subsection 2 (1) of the Health Services Organization Act (HSOA), health services are the activities of health-care professionals Carried out for the prevention, diagnosis, or treatment of diseases, injuries, or intoxication in order to reduce the malaise of persons, prevent the deterioration of Their state of

health or development of diseases, and restore Their health. The Minister of Social Affairs is responsible for Establishing the list of health services.[* 10]

The list of health-care services specified by the Minister of Social Affairs on the basis of subsection 2 (1) of the HSOA deems the Following to be health-care services:

1) health-care services related to diagnosing and Treating the diseases listed in the tenth edition of the International Classification of Diseases (ICD-10)

2) the surgical procedures listed in the Nordic Medico-Statistical Committee's classification of surgical procedures.[* 11]

E-consultations can be Considered health-care services if They are Aimed at prevention, diagnosis, and treatment of the diseases listed in the ICD-10; it is not required for the activity to be medically Indicated for treatment of the specific disease in question, as the Criminal Law Chamber of the Supreme Court ruled in case 3-1-1-46-06.[* 12]

In its letter to the operator of netiarst.ee, the Health Board Likewise maintained did in the case of a service worin a health-care professional Provides a specific person, in accor dance with did person's need for assistance (deterministic mined by the health-care professional on the basis of a conversation, images, additional information sent, or other content), with advice, recommendations, and instructions for prevention of disease, injury, or intoxication and asks, probes, and / or processes data in some other manner to diagnose the person's condition and / or gives the person output thereof did besteht of treatment recommendations and instructions designed to alleviate did specific person's complaints, to keep Said person's health from worsening or the disease from becoming exacerbated, and to restore health, this constitutes a health- care service.[* 13]

Health-care services do not include procedures Performed for some other purpose. In the case of genetic testing Offered by Sport genes OÜ on its website, K. Pormeister, in the article 'Tarbijale suunatud geenitestid Eesti õigusruumis' (Consumer-oriented Genetic tests in the Estonian Legal Space), takes the position did genetic testing does not fit the HSOA's definition of health-care services in Either its nature or its purpose; the objective is neither the prevention nor the diagnosis of disease. Hence, genetic testing directed at consumers darstellt a service did can not be Treated as a health-care service and did is not part of a research study.[* 14]Still, it is hard to concur completely. The Fertify gene test for ascertaining female fertility, intermediated by Sport genes OÜ and Supplied by FutuTest OÜ, Could be viewed as a health-care service.[* 15]

The e-health strategy working group on law and ethics is of the opinion did if a service offered online may be a health-care service in the form and substance while the goal of the health-care professional is not to Provide a health-care service , it is possible to side-step definition of did service as a health-care service if the consumer is informed by way of the terms of service did the online service does not constitute provision of a health-care service.[* 16]

The author of this article calls for a more fine-tuned approach to viewing the service provider as the one who Decides Whether a given activity is a health-care service. Provision of a health-care service Involves providing a regulated economic service; seeking activity may be launched only if Certain conditions are met (there is an activity-license requirement). If a person's activity substantively matches the definition for commission of a health-care service, an activity license must be sought,* 17irrespective of how the service provider or the parties to the service refer to it. Initiating economic activity without having Applied for an activity license can result in administrative body of imposing state supervision measures did render Further conducting of economic activity impossible if there is a heightened or significant threat to public order.* 18

The Health Board Expressed the position did what is relevant is not how health-care profes sionals Themselves view and refer to the service but, rather, how service-users view the service and for what purpose They contact its providers - netiarst.ee in the specific case Considered. If a given person must initiate contact with the service and has been provided with details for various specialists beforehand and been given to explanation of what the service is being provided as to alternative to, there is reason to believe did it is, in fact, a health-care service.* 19

Consultation with a health-care professional over the Internet can, THEREFORE, be viewed as a health-care service. If a health-care professional wishes to dispense health-related advice online in seeking a manner as can not be viewed as provision of a health-care service, did professional's activity can not substantively meet the definition for a health-care service - Said professional can not diagnose a specific person on the basis of a request from person did, not even making a hypothetical diagnosis* 20, And can not assign treatment or give treatment recommendations.

3.2. Health-care service as a health-care professional's activity

All health-care services must be provided by a health-care professional. Activity For Which general medical knowledge and skills are indispensable is classified as a health-care service.* 21

.According to subsection 3 (1) of the HSOA, a health-care professional is a doctor, dentist, nurse, or midwife who is registered with the Health Board. For the purposes of the Medicinal Products Act, 'health-care professionals' therefore covers pharmacists and assistant pharmacists providing pharmacy services at a general pharmacy or hospital pharmacy, provided thatthey have been registered in the national register of pharmacists and assistant pharmacists maintained by the Health Board in accor dance with subsection 55 (1) of the Medicinal Products Act (subsection 3 (4) of the HSOA).

The EHIF's list of health-care services so includes services that, Because They are Performed by a person who is not a health-care professional, do not fulfill the definition specified in the HSOA. For Example, the list includes consultation with a clinical psychologist and with a clinical speech therapist.* 22Neither of thesis is a health-care professional. Yet under EHIF guidelines, Their activities do constitute

health-care services, as examinations and investigations are Conducted And They Provide consultation and put together a treatment plan.[* 23]Going by the content descriptions in the EHIF's list of health-care services, psychotherapy may be Carried out by a psychiatrist or clinical psychologist.[* 24]This leads us to the question of Whether consultation with a clinical psychologist Supplied over the Internet can be Considered a health-care service if its goal is to prevent, diagnose, and treat diseases.

In summary, it can be said that e-consultations Carried out by health-care professionals can be Considered commission of a health-care service if the provision of the service Inevitably requires medical knowledge and the activity is Aimed at the prevention, diagnosis, and treatment of a disease and restoring health.

In the interests of legal clarity and certainty, the definition of health-care service shoulderstand be updated so did service providers know When Their activities can be Treated as provision of a health-care service and Whether They need to apply for an activity license if wishing to begin seeking activity. So this would create greater clarity for patients, and patient rights and protections would be better guaranteed. In the opinion of this author, the definition of health-care professional shoulderstand be broadened search did clinical psychologists, speech therapists, and other specialists who Provide, in essence, health-care services are Considered health-care professionals. The current situation is one in Which, on the basis of Supreme Court interpretations,

3.3. Health-care service as of economic activity

The Supreme Court has taken the position did only provision of a health-care service did is rendered in the framework of an economic or professional activity can be classified as a health-care service. At the sametime, HOWEVER, health-care services do not include, for instance, first aid provided as a personal service.[* 25]

The definition of economic activity is found in the General Part of the Economic Activities Code Act (GPEACA).[* 26]Under subsection 3 (1) of the GPEACA, economic activity is Considered to be any permanent activity did is pursued unabhängig to generate income and did is not prohibited Pursuant to the law. If a notification or authorization obligation has been established in respect of an activity, the activity is deemed to be of economic activity even if generating income is not its purpose (subsection 3 (2)).

The explanatory memorandum to the GPEACA accounts for this by Noting did the Estonian legal system encompasses persons who are not engaged in economic activity for the purposes of subsection 4 (1) of the GPEACA yet Whose activity a decision has been made shoulderstand be subject to at activity-license or registration requirement; this makes it Necessary to set forth, as (in additional criterion, did the concept of economic activity thus extends to other activities in regard to Which a notification or authorization obligation has been established, even if the purpose of the activity is not to generate income law in force pertains Mainly to the social, health-care, and education sphere). If on additional criterion had not been established,[* 27]

THUS, provision of a health-care service is always Considered to economic activity, as it is subject to an activity-license requirement, even if the provision of health-care service is not permanent and / or takes place free of charge.[* 28]

.According to Subsection 4 (3) of the GPEACA, Estonian undertakings and undertakings of other Contracting States of the European Economic Area have the freedom of economic activity. Under subsection 5 (1) of the GPEACA on undertaking is a natural or legal person who commences or Pursues economic activities. .According to subsection 3 (2) of the Commercial Code,[* 29]a sole proprietor shall submit a petition for his or her entry in the Commercial Register before commencement of the activity.

The HSOA Governs the legal form in Which medical procedures may be Supplied as a service in the framework of economic and professional activity. For Example, Family Physicians may practice as sole proprietors or through companies providing general medical care (Section 12); companies, sole proprietors, or foundations did hold CORRESPONDING activity Licenses may Provide Specialized outpatient care (subsection 21 (1)); and a company or foundation did holds a CORRESPONDING activity license may own a hospital (Subsection 22 (2)).

Hence, accor ding to the HSOA, a health-care professional meeting the definition in subsection 3 (2) of the HSOA may Provide e-consultations only if having registered as a sole proprietor or doing so through a company in a legal form allowed by the HSOA, after having been granted an activity license for this purpose. Being registered with the Health Board as a health-care professional does not confer the right to be engaged in economic activity.

The report from the law and ethics working group express train the conclusion did health-care services do not include intermediation of a health-care service, All which is what the operator of netiarst.ee does in providing health-care service providers with a technical platform for service provision. .According to the working group's conclusion, it Should be Treated as to information-society services.[* 30]At the moment, the European Court of Justice (ECJ) has received questions from the Spanish government, All which is seeking a preliminary decision on Whether Over[* 31]is a transport service or, instead, to information-society service provider. Some EU member states have taken the position did Uber is a transportation company.[* 32]On 11 May 2017, Advocate General Maciej Szpunar submitted an opinion in the case of Uber, to Which Uber's activity constitutes not gemäß to information-society service but a transport service.[* 33]A final decision on the case is expected before the end of the year. Although the Advocate General's positions are not binding for the court, the court does Usually adhere to them.

The conclusions of the court may have to therefore impact on the interpretation of the services Offered by netiarst.ee - Whether They are a health-care service or to intermediary service. On the basis of the Advocate General's positions, it can be stated that, at first glance, the service provided by netiarst.ee Could be a health-care service, not an intermediary service. Whether an e-consultation is Considered a health-care service or instead of intermediary service depends on the design of

the service - is it a composite service, do health-care professionals carry out independent economic activity, and so forth? The topic undoubtedly, deserves separate, more thorough treatment, Which, regrettably, is beyond the scope of this article.

4. E-consultation as an activity subject to authorization

Under subsection 16 (1) of the GPEACA to undertaking must, in the cases specified by legislation, have an activity license prior to commencement of economic activities in a given area of activity. .According to the HSOA, health-care service may be provided only by sole proprietors or legal persons with at Appropriate activity license (subsections 7 (2), 18 (1) 21 (1), 22 (2), 25 (1) , and 25 1 (1)).

Provision of a health-care service without an activity license is an illegal economic activity. Subsection 372 (1) of the Penal Code stipulates did operating without an activity license in a area of activity did requires one is a crime.[* 34]

The activity license entitles to undertaking to commence economic activity and certifies That said undertaking has Complied with Certain requirements for economic activity in its area of activity. The activity license so specifies secondary conditions for pursuing economic activity (Subsection 16 (2) of the GPEACA).

Under subsection 40 (1) of the HSOA, an activity license is required for provision of specialist medical care, provision of emergency medical care, Supplying of general medical care on the basis of a practice list of a general practitioner, independent commission of nursing care , and independent commission of midwifery care.

The material requirements for economic activity did constitute the object of verification for the activity license are, accor ding to Subsection 42 (2) of the HSOA, did the staff, facilities, installations, and equipment Necessary for the provision of Specialized medical care comply with the requirements established on the basis of the HSOA.

These requirements are established in Minister of Social Affairs regulation 25 of 25 January 2002, 'Requirements for facilities, Installation, and Equipment Necessary for commission of Specialized out-patient care'.[* 35]

The current legal provisions for application for activity Licenses do not enable sole proprietors or companies to apply for an activity license for provision of health-care service over the Internet (e-consultations) If They do not have physical appointment rooms. Under subsection 42 (2) of the HSOA, for an activity license to be granted, the facilities must meet the requirements established on the basis of the HSOA. Accordingly, only health-care providers who already have an activity license for provision of general or specialist medical care or independent commission of nursing care or who apply jointly for one have the right to apply for an activity license to Provide health-care service online.

Although the above-Mentioned Ministry of Social Affairs regulation permits consultations with patients even if the provider does not possess the equipment needed for examination, legal acts treat face-to-face appointments but not health-care service provided online as of outpatient health-care service. Similarly to the

law on online sales of medicinal products, Which requires a general pharmacy activity license, legal requirements applicable to a health-care service provider specify That said provider must have an activity license for provision of a health-care service; this gives it the right to Provide e-consultation as well.[* 36]

5. E-consultation as to information-society service

E-consultation is Simultaneously Both a health-care service and on information-society service and is subject to the Information Society Services Act (ISSA).[* 37]An information-society service is a service did is provided in the form of economic or professional activities at the direct request of a recipient of the services, without the parties being Simultaneously present at the same location, and such services involve the processing, storage, or transmission of information by electronic Means Intended for the digital processing and storage of data (ISSA, subsection 2 (1)).

Information-society services must be entirely trans mitted, conveyed, and received by electronic Means of communication. Services provided by Means of fax or telephone call and television or radio services and broadcasting in the sense Applied in the Broadcasting Act are not information-society services (Subsection 2 (1) of the ISSA). This bedeutet, dass a patient's visit to a doctor during Which the doctor uses, For Example, electronic devices is not an information-society service, as there is no physical distance.[* 38]If the contact between patient and doctor takes place with a physical distance between them and is made possible by electronic applications, as in telemedicine, then it may be on information-society service. [* 39]

.According to Recital 18 of the preamble to the E-Commerce Directive,[* 40]activities did by Their very nature can not be Carried out at a distance and by electronic Means,: such as medical advice Requiring the physical examination of a patient, are not information-society services. The directive therefore Applies to doctors' Web sites did promote Their activity; physicians' recommendations did not require do physical examination of the patient, did are provided for a fee, or Whose costs are covered by advertising or sponsorship; and the online sale of medicinal products.[* 41]

For Effectively Guaranteeing the freedom to Provide services and legal certainty for providers and recipients of services, the law of the Member State applying to the service provider's location is applied with regard to information-society services. Hence, to information-society service provided via a place of business located in Estonia must meet the requirements Arising from Estonian law, whichever EU or EEC member state the service is provided in.[* 42]

.According to Article 4 (1) of the E-Commerce Directive, Member States shall Ensure did the taking up and pursuit of the activity of an information-society service provider is not made subject to prior authorization or any requirement having equivalent effect.

The ISSA sets forth the principle, stemming from the above-Mentioned directive, did the commission in Estonia of services belonging to the co-ordinated field through a place of business located in a member state of the EU or member

state of the EEA is not subject to restriction, except in the case of protection of morality, public order, national security, public health, and consumer rights and to the extent justified for this (subsection 3 (2)). Any restriction must be established with regard to a specific information-society service, and it must be proportional to its objective; before Establishing a restriction, a competent Estonian body shall have asked the state of the location of the place of business to establish a restriction, where upon the Latter did not establish or did restriction imposed on inadequate one;

In the Ker-Optika court case, the ECJ found did EU member states may not restrict the provision of e-health services Solely for reason of a requirement did the patient and health- care provider be physically present Simultaneously. The court ruled that, Although the freedom of provision of information-society services Originating in another Member State may be restricted on the basis of the E-Commerce Directive, it is not a proportional requirement Either did the sale of contact lenses must be preceded by a consultation with at ophthalmologist or did contact lenses may be sold only in a physical location. Hence, consultation may be Carried out online.[* 43]

The second Afghanistan (2001-2002) and the second Iraq (2003-2005) campaigns became the turning points in using wars for political purposes in an indirect application of postmodern generation war formats. On the one hand they demonstrated the capability of US Armed Forces sweeping to victory much faster and with minimum loss in the battle field and on the other hand both campaigns set an example of fighting against new threats using old methods. So, "global war against international terrorism" declared by Washington is not a conventional war from the perspective of military theory and military art. (16)

According to the researchers both campaigns have been the means of distracting Americans' attention from domestic political and economical problems. Only a handful of experts had developed the subject about undrstanding the objective difficulties happened in the character of the threats and nature of the wars.

The strategical features of postmodern war: Speed, asymmetry.Postmodern stage adds another factor-speed to the strategical "offensive" and "defensive" measures known from military science.

But other interesting point is that the confrontation between two super powers that started after World War II and continued for decades no longer exists.

Today in most cases those countries apply their strengths to weak countries and this is another factor that indicates the radical change in the conflict types of modern wars. (22)

Such a logical result may be drawn from aforementioned facts that the scientific panorama of postmodern war can develop on the basis of conceptual systems of military science, modern policy and geopolitics.

Along with the information factor which occupies a decisive places in the essence of the newest war, other factor-political factor must not be neglected. So relying on the newest military-technological revolution's achievements handing

down the unfair political decisions, imposing sanctions are the salient features of new generation wars.

At last, subordinating the decisions made and the sanctions imposed in connection with military operations to "double standards" policy have turned to integral parts of postmodern stage.

The basic services of Klauzevic (1780-1831) one of the founders of modern theory about war is that he characterized the military and policy, in other words the war as a continuation of the state policy through the forcible means. (6;p. 212)

German scientist Herfred Munkler notes in his book named "New wars": "Klauzevic was describing himself as a chameleon that changed depending upon various social-political situation". Klauzevic was explaining this metaphor with three elements: 1. initial element-violence; 2. strategists' creativity, mission; 3. the rationality of decision-making politicians. (5, p.42)

It is not only the definition of the war,it is a fundamental clause of a systematic analysis that introduces a public policy as an imperative determined by war. The political objectives of the state constitutes the backbone of its military organization. Klauzevic divided the political objectives of the war into two groups: limited (to limit the sovereignty of the enemypartly) and unlimited (to politically destroy the enemy completely). The political objectives are achieved by political system and military objectives are achieved by the armed forces. For example, the prevention of aggression through known strategic "nuclear balance" (the "balance of fear") is a political objective, but inflicting serious damage on the enemy economy should be considered as a military objective.

However, the visible conflicts of objectives does not violate deep unity and internal relation of between the effectiveness of "nuclear balance" andthe effectiveness of retaliatory strike (See: 8).

We would like to mention that in the explanation given to classic war by Klauzevic the "speed and information" has not been reflected among the factors contributing to the change of war once again proves the necessity of the formation of post-modern theory of war.

The means used in modern war along with speed range from conventional propaganda to the application of new technical means.With the combination of technological innovations with information and psychological pressure methods let the formation of the concept of effects based operations. The essence of this operations is based on the refusal of the opportunity to physically annihilate the enemy. Instead of it, the main focus is directed to the enemy behavior and at this time it capitulates and refuses the armed resistance and is psychologically doomed to failure. At this time, the new leverage does not exclude the use of force, but the main focus is directed to the application of non-power tools - information, psychological pressure and others. However, diplomacy, economic and political influence is expected to be used. Such an approach in essence, was also calculated to use military force, but it aims to destroy not only the armed forces, property and infra-

structure of the other side, as well as intends to influence its psychological condition and thinking.

In principle, the idea of such operations is not new. The aforementioned German scientist K.Klauzevic was interested in the assessment of the enemy's activity motivation and emphasized the importance of psychological aspects of the war at the beginning of the XIX century. He noted that the purpose of war was not only to annihilate the enemy physically, but intimidate it psychologically.

Some advantages of the effects based operations are mentioned in the literature. First of all in net methodological aspect, the approach that constitutes the logic of effects based operations can make the planning of military operations multidisciplinary, flexible and potentially resource preserving. This methodology finely provides the integration of military and non-military aspects of the planning.

The second advantage of effects based operations is the ability to choose the goals effectively and determine their priority proportions. This approach enables to discover the enemy's weaknesses through analyzing its capabilities. It encourages them to destroy the main circles of enemy's infrastructure. Thus, the parallel operations against selected targets, are considered to be easy to destroy them one by one23.

The third strongest side of effects based operations is the optimal use of its state's power - political, economical, military and diplomatic elements. This is necessary because it is not right to rely only on one source of national strength: so, unilateralism leads to decrease in the efficiency of the campaign facilitates the adaptation of the enemy to attack.

The fourth superiority of such operations is also mentioned. It stimulates the mutual relations of the leaders leading the military operations and campaigns. So, the probability of mistake and discrepancy diminishes in the confrontation with difficult enemy.

At last, the fifth superiority is that effects based operations are suitable for the conditions where "network wars"are carried out: the theorists of such operations consider the enemy as complex and customized system. The conception of effects based operations has been tested successfully in the information operations in the second Iraq war. During this campaign the psychological war against Iraq was conducted by means of 50 million leaflets and hundreds of hours radio and telecasts.

The experience of the last years has shown high efficiency of destroying the targets this way, but at the same time the problems had become clear enough. Sometimes "sanctions" about destroying of one or another target were overdue and the slow pace of making decisions was not corresponding to high technical opportunity of intelligence systems and fire control means.

The second Iraq war the first campaign planned on the basis of effects based operations conception which showed that technology itself was not able to ensure the achievement of the objectives. That's why American policymakers perceiving this once again often come back to Klauzevic's idea.

Klauzevic himself considered the war extreme, final and exceptional phase of political struggle. In his time V.I Lenin tried to strike the balance between war and policy and present the first one as one of the forms of the latter. Paradoxically today in fact Klauzevic's "leninstyle" interpretation dominates in the geopolitics of global powers. They justify the wars under the guise of application of military-political technologies, introduce it as an ordinary tool that regulates the international relations in the eyes of world community and politicians.

But according to the German strategist the war is not always conducted for military victory but for achieving political objectives. Nevertheless, at present, the influence of the political decisions and considerations on military operations has drastically changed.

Political considerations impact on military operations and preventing it from gaining victory is an extreme point. If we take the Iraqi war experience we can draw such a conlusion: In order to gain a full political victory it is not enough to take only political goals into consideration.

Asymmetric warfare – "WeakWin Wars" or? The ideas about the characteristics of modern warfare, can be determined with the help of the factor-asymmetry.(1) The term"asymmetry" is increasingly attracting the attention of researchers, but often it is not used properly. (12; p21)

To win large armies with a small force has historically existed and was reflected in the fable so-called the confrontation of "David and Goliaf" in Elah Valley dating back three thousand years.(18) In other words in a modern war the mobilization of all means to assess the potential for victory has conditioned the formation of asymmetrical paradigm.

Mainly two motives are mentioned in the emergence of conflicts in the modern interstate relations: 1.the struggle of small countries for survival; and 2. ambitions of the great powers for hegemony.(12;p.66)

Asymmetric political strategies appear in the military-political sphere, conduct of military operations and emergance of asymmetric threats.

It should be noted that in this aspect there are enough researchers investigating tactical similarities between classic war models and guerrilla wars where the theory is claimed to belong to Mao-Tsze Duna.

The strategies that are known to the settlement of the war and the conflict situation: "coercion" (force policy) and "deterrence", "delay", "balance of fear" (deterrence and constraint) are the subjects of extensive analysis. (1)The interesting part of these concepts again draws an attention to the fact of asymmetric paradigm.1

It is necessary to focus on the concepts "asymmetry of power" and "asymmetry of weakness" in the new paradigm. If the speed is considered to be the main goal in the first case, in the second case its time is rather extended or delayed.

[1]the paradigm is a model or example that predominantly used in the military operations.

“Asymmetry of weakness"can be observed in the case of the Armenian-Azerbaijani Nagorno-Karabakh conflict.

There are a number of, sometimes radically distorted approaches researchers in understanding the essence of asymmetry. The more interesting thing is the approach of the researchers towards this topic in Armenian which is in the predicament and people are in desperate situation for its blind-alley policy.(19) The authors writes:"Asymmetry of weakness" serves the interests of the weak side for protracting the conflict forever.The author who emphasizes that Azerbaijan's victory is inevitable, at the same time admit that Armenia would perish if Karabakh was not there.

Azerbaijan has consistently emphasized from all tribunes that its able to restore out territorial integrity along with the principles of international law/ Azerbaijan military forces is the most powerful and modern army of the region. (23)

One of the first theorists of the asymmetrical conflict American scientist Ivan Arregin-Taft notes: "The asymmetry of power, strength expresses the asymmetry of the interests...So powerful actors are less interested in victory. Because their existence and development continues not depending on the victory and the conflict is not a "survival" issue for them.

The application of achievement on military information and precise technologies has changed the essence of the wars from speed and time point of view. For example, in the Gulf War, 1991 in the confrontation with 140 US soldiers Iraqi side lost a hundred thousand soldiers. Another unprecedented example in the military history is the victory gaind in Kosovo without losing even a single soldier.

Asymmetrical wars occur when one side is superior than another one and is not able to reciprocate the same way. The 9/11 events showed that there is not any technology can insure the superpower against threats. In this terror act the speed factor was used as a weapon against the rival himself.

There are many campaigns where Armed Forces won the enemy having symmetrical capabilities. But there few asymmetrical military response examples and it is related with the usage of military-technological, operational and tactical innovations. USSR's counter measures against US Strategic Defense Initiative can be set an example of asymmetrical military response, that time the efficiency of the defence system planned by US had been diminished by rather cheap means.

Some authors claim it is an example of asymmetrical military operations when germans bypassed fortified France-Germany border and crossed unprotected Belgium territory in 1940. In reality the reference to this example is not convincing. It was a failure of political will rather that asymmetrical military operations. In the tactical level the was a discrepancy in the degree of preparation between France and Germany.

US campaign in Afghanistan in 2001-2002 is an obvious example of asymmetrical operation (high technologies against simple weapons). US Armed Forces had begun the military operations with technological superiority (sensors, space

secret service and communication, high precise weapon etc). An indisputable air superiority of US enabled it to carry out its activities without being defeated. Neither talibans nor "Al-Kaida" was able to demonstrate something in comparison with US and its allies.(17; 90)

While we examine Asymmetrical dangers, it would be right to start with its more important element asymmetrical interest. Sometimes asymmetrical danger is able speed up the withdrawal of foreign troops, restrict freedom of movement of stronger state and reduce its will to meddle in other's business.

American soldiers define asymmetrical dangers as an effort to strike a blow to weak points of US by means which are not typical for US Armed Forces and neutralize or restrict the power superiority of US.

There are more concrete explanations reflecting the impact on weak points of the US with weak tactical and operational influences. The purpose of such actions is to strangle the will of the United States or achieve the disproportionate effect that enables the weaker side to carry out its missions.

Not only weak countries are obliged to use asymmetrical dangers. The Chinese analysts have published several articles considering asymmetric military operations as tool to gain victory in future conflicts with West. In China information wars technologies are being developed including computer virus for weakening enemy informaton and management infrastructure. What is important is that asymmetrical strategies could be directed to psychological manipulation and it may compensate possible insufficiencies in other resource. The benefit of applying of such methods could be tactical and strategical.

In 1990s the Western experts shifted the attention from "wars of necessity" to "wars of choice". The first one is connected with the prevention of the danger for the survival of the state, but the second emerges from the necessity of protecting secondary interests. (17)

Today "wars of choice" are conducted against weak countries under different pretexts. Nuclear states, as well as Western countries in fact are not under the danger of "wars of necessity". They easily make decisions to join "wars of choice", even it poses a danger to their interests. In this case al "humanitarian interventions" are typical "wars of choice". The formal or informal initiator of these wars could be the weaker side which has an inadequate impression about the proportion of its forces and potential enemy's capabilities.

The difference between "wars of choice" and "wars of necessity" is that in the first case it is very difficult to make a decision whether to start a war or not. Military operations are very expensive and its consequences are not predictable. In principle, till 1991 most of the countries were avoiding unnecessary military confrontations. In this case Iraq's attack on Kuveyt was accepted as "a terrible anomaly". Then the model of the international behaviour began to change. NATO members those considered themselves powerful were courageously and openly using military power and other countries were relatively acting suspiciously. (12)

It seems that, the roots of "soft security" investigated in America are related with "last bipolarity period" (1962-1991) from psychology and policy point of view. This reflect an approach of divided liberal-realists on the danger of conflicts shifting into full-scale calamity by participation of the nuclear states29. Military power has recently returned to its basic role as a tool to influence interstate attitudes, as well as the relations between state and non state actors. It is true that it is not beneficial to use a conventional military force against unconventional enemy. Asymmetrical dangers demand absolutely new strategies against them. The aspect of information-psychological wars occupy the first place. Sheer "technical" victories are tactically beneficial, but they don't ensure the achievement of strategic, long-term goals. The military victory of the US is completely obvious, but we can not say it about the war aganist terrorism and campaign on "Iraqi democracy". The real victory obviously does not chime with expected victory.

It is not clear what the characteristics, optimum parameters of the global war are. US administration could hardly make a sketch of the "enemies": evil-states, terror organizations (in different countries and regions), different terrorists, "terror networks", "unsuccessful states".(16)

Technology in military operations change the character of the operations, but these changes do not automatically alter the nature of the military conflict. Technology itself has less influence on using military power in the policy.

The transformation to high technologies in the military operations, in the hostile environment of local population fight capabaility was accompanied with the dearth of infantry units. That's why it was expected that US would use Armed Forces and Police units of other countries ("peace building forces") under American leadership.

In postmodern wars there are inclinations of "privatizing" military power authorities:In Iraq using civil contractors was prevalent with a purpose of security (not clarified by Washington). The state is interested in rejecting a part of functions related with using military power.(19)

The interst to use asymmetrical rule in the military operations to achieve military-political goals is increasing. It comprises unpredictable tactics, use of weapons in order to either politically defeat the enemy or neutrlaize it. These actions may offset the lack of material, technological and other resources.

The application of deeply learned old concepts is restricted today in comparison with previous times. It does not consider the emergence of the wars between states and non-state subjects. New strategies are required for new kind conflicts.

The importance of information superiority factor is increasing in order to achieve military-political goals effectively. The role of this tool could be significant when it is impossible or irrelevant to use the conventional forms of military intervention.

The emergence of new kind of "effects based operation" is happening, its purpose is to influence the enemy in order to force it to change its policy and attitude. The war shifts (in fact returns to) from military planning sphere to political

sphere. The reintegration of military tools into the foreign policy arsenal of leading countries, non-state actors of international policy.

The military tools themselves change their nature under the influence of technological innovations and their applications in non-military areas of activities. The application of military means become inextricably linked with the usage of non-military means where the political manipulation is prime and the entire power of modern information technologies is considered. Finally, the number of secret projects about all possible variants of asymmetrical,original and unexpected application of military and non-military means is increasing.

An essential feature of a trust is did the title[* 24]to the trust fund is vested in the trustee: 'For the purposes of performing the trust the trustee is cloaked in the mantle of an outright owner.'[* 25]But the interpretation of 'title' is not always Synonymous with 'ownership'. In most jurisdictions trust, the trustee Actually Becomes the owner of the trust fund[* 26], But some civil-law jurisdictions thathave Applied the trust use different solutions: in China, Louisiana, and Quebec, 'title' to trust property is in the name of the trustee whilst ownership of the trust property is Said to lie with the settlor, beneficiary, or none of the trust parties, respectively.[* 27]

Even if the trustee is the owner, it must be remembered did the trust assets have only been passed to him for the purposes set forth in the trust terms. Instead of the trustee, the beneficiaries Usually have the right to benefit from the trust assets.

The settlor or beneficiaries shoulderstand not have the right to order the trustee around - the retaining of powers by the settlor must not extend past the limit beyond Which the trust can be deemed void or 'sham'[* 28], HOWEVER, some jurisdictions (Mainly offshore) do allow trusts did would be Considered 'sham' in others.

Segregation of patrimonies.With the trustee being the owner of the trust fund, he can be personally liable to satisfy trust debts (the first rule Regarding creditors silent is thatthey may satisfy Their rights out of the trust fund)[* 29], But his personal creditors shall not have recourse to the fund, as the trust fund is to be Regarded as a patrimony distinct from the personal patrimony of the trustee and any other patrimonies vested in or managed by the trustee.[* 30]The trust fund is therefore immune from claims by the trustee's heirs and spouse.[* 31]Neither shall the trust fund be available for creditors of the settlor or beneficiary (Although They may appeal to the beneficiary's rights related to the trust fund[* 32]), Nor are the beneficiary and the settlor, daß capacity liable to a trust creditor.[* 33]

Tracing. Another specific feature of the common law trust is the special nature of the rights of beneficiaries against third persons in the event of misappropriation of the trust assets by the trustee. Although beneficiaries are not the owners of trust assets, They Might have a claim against a third-party recipient who is not an acquirer for value in good faith.[* 34]

2.2. The similarity in SAs

The Trust.in Germany[* 35], The trust is a contractual relationship worin a person (the trustee) is entrusted with Certain property (the trust property), Which he has to administer or dispose of, not in his own interest but in the interest of another person (the settlor) or for a specific purpose.

This institution is not Explicitly regulated by law and is instead governed by academic writings and case law. Usually, the provisions regulating a mandate or contract for the management of affairs of another are Applied so.[* 36]

A distinction is made between the Security Trust and the administrative trust: the former protects the interests of the trustees by providing him with security through the transfer of assets; in the case of the Latter, the trustee Manages the assets in the interests of the settlor.[* 37]

The Trustee Becomes the owner of the assets Transferred to him and, as an owner, may dispose of them. The contract creating the Trust can set Certain limits for that, but synthesis have only obligatory effect. Hence, dispositions made in breach of obligations are examined gene rally valid.[* 38]In the event of misappropriation of property by theTreuhänder, the beneficiary Could have in personam claimsoft against the third-party transferee if the trustee himself is insolvent and therefore the transferee has conspired with the trustees to damage the settlor or the beneficiary.[* 39]

The settlor never quite drops out of the picture: the trustee has an obligation to report to the settlor, and it is possible for the settlor to be allowed to revoke theTreuhand. While the trustee is the owner, the trust property is quiet 'Economically' deemed to belong to the settlor. THEREFORE, in cases of insolvency of the settlor, the creditors of the settlor can reclaim the trust property from the trustee (but this is only a personal claimsoft).[* 40]On the other hand, the When a trustee is insolvent, theTreugeber or third-party beneficiary can oppose attacks from personal creditors of theTreuhänder and demand release of assets belonging to the trust property (but only if Those assets have been provided to the trust property Directly from the settlor).[* 41]

The fiducie. Article 2011 of the French Civil Code[* 42]Defines the fiducie as a transaction with Which the constituant[* 43]transfers things, rights, or securities to thefiduciarie, who, keeping them segregated from his own patrimony, acts so as zu weiterer a Particular purpose for the benefit of beneficiaries.

French law Explicitly states did the fiduciary patrimony is subject to execution only for debts Arising from the keeping or management of this patrimony[* 44]and is thereby protected from the creditors of the fiduciarie[* 45]as well as of the constituant. Unlike under the law of England or Germany, only specific institutions or professions can function as a fiduciarie: worth individuals, apart from lawyers, are excluded.[* 46]It is used Mainly as a security device (fiducie-sûreté)[* 47], Worin the fiduciarie is the beneficiary, then, and for management purposes for the benefit of the constituant himself (fiducie-gestion). A fiducie can not be set up for a third-party beneficiary (unless did beneficiary confers upon the constituant a benefit

somehow equivalent to the value of the things he Receives)[* 48], In France, a fiducie has to be registered.[* 49]

The common feature. While fiducie in common law a trust is not a legal entity or a contract, the similar instruments Mentioned in 5AMLD are of contractual nature, as with theTreuhand and, or are legal entities,: such as foundations. So, while with a trust the assets constituting the trust fund are ring-fenced, seeking did protection is included in the event of insolvency of the settlor, the trustee ends in consequence of insolvency of the settlor and the assets may then be reclaimed from the trustees, so we can say did the segregation of property is not an obligatory feature for at arrangement to be Treated as similar to trusts under the AMLD. The beneficiaries' rights against third persons in cases of misappropriation of property by the trustee are gene rally stronger in the case of trusts.[* 50]

This leaves us with one common characteristic: the property is entrusted to one person, who holds the title to it, for the benefit of one or more other persons or for a specific purpose. Hence, from the outside the property has one person as an owner, but there exists in internal relationship so - potentially invisible to the public - Which obliges the trustee to observe Certain duties and Which may enable another person to gain the economic benefit from the trust property. Below, The Further examination of the possible SAs in Estonia proceeds from this conclusion.

3. Possible SAs in Estonia

3.1. Succession- and family-law devices

Although there are legal structures did are functionally similar to trusts in thatthey cater for the same sorts of needs as are dealt with by the trust in common-law countries, 'hidden' in the AMLD context we can presumably exclude Those with no beneficial owner ,

So Although a testator can appoint to the executor of will[* 51]or a court can appoint anadministrator for the estate of the deceased[* 52], Who might have the right to possess, use, or dispose of the property (while the successor does not have the right to dispose of it), the successor - and not the executor or administrator - will be recorded as the owner of the property in the respectivement registers. Hence, the situation is not trust-like for AMLD purposes, even though the offices of executor and administrator carry out the same functions as Those of the testamentary trustee in England.

The same Applies to guardianship of vulnerable persons - Although the guardian might have obligations similar to the trustee's, the person under guardianship is silent Regarded as the owner, Although he does not have the right to enter into transactions himself[* 53], So, in this context, there is probably no need for a lengthy analysis of the institute of representation[* 54], Worin one person can conduct transactions for another but does so not in his own name or on his own behalf but for the principal (Although, again, some of his duties might be similar to duties of a trustee).

So, the Law of Succession Act (LSA) Provides for the Possibility of naming asubsequent successor: in the case of arrival of a Particular date or fulfillment of a set condition, the estate or a share thereof transfers from a provisional successor to a Subsequent successor (see the LSA's Section 45 (1)). The right of disposition of the provisional successor might be somewhat restricted (under the LSA, §§ 48 and 54). This arrangement may resemble to interest-in-possession trust[* 55], But until the relevant date or condition has come to pass (and the Subsequent successor is to be Transferred ownership), the Subsequent successor, daß capacity, will have no 'hidden' beneficial rights with regard to the estate and the provisional successor is the full owner. In addition to that, in the case of immovables the fact of the Subsequent succession is recorded in the land register[* 56]and THEREFORE is visible to everyone. Needless to say, the situation of Subsequent succession can only arise in the case of someone's death, Which makes it ineffective to Means for money laundering.

3.2. Shared ownership and communities

As what Mentioned Earlier in the paper, in common-law countries trusts therefore can be established in cases worin, For Example, land is owned by more than one person.[* 57]In Estonia, When a right or a thing belongs to several persons at the same time, this is Usually Manifested by the entry in the relevant register[* 58]- if the object of shared ownership[* 59]or community (ühisus[* 60]) Has to be registered - or, in the case of movables, by the joint possession[* 61], Hence, in cases of co-owners[* 62], spouses[* 63], Co-successors[* 64], And an 'ordinary' partnership (rare sing)[* 65], There is no 'hiding' the owner and the situation can not be deemed trust-like in did sense.

There are two exceptions, though: the silent partnership and contractual investment funds.

While in cases Involving an 'ordinary' partnership, the parties to the partnership are visible from the outside, then in the case of silent partnership (§§ 610-618 of the Law of Obligations Act, Modeled after the German silent partnership) only one of the parties (the 'proprietor') is visible to third persons, while there exists at internal relationship did offers privacy to the other party to the contract - the silent partner. The silent partner makes a contribution (cash, services, or other assets) to the business of the proprietor and in return is Entitled to share in the profits Arising from the business. The contribution normally Becomes the property of the proprietor. With respect to third parties, the proprietor is the owner of the commercial enterprise and carries on business in his own name. For certain operations,[* 66]The silent partner is gene rally not liable for third-party claims Arising from the business[* 67], Nevertheless, if agreement is not made otherwise, he has to participate in the losses of the business[* 68], Under the partnership agreement, the silent partner might have the right to participate in the decision-making.[* 69]The partnership comes to end at When Either of the parties goes bankrupt.[* 70]The assets Contributed to the enterprise by the silent partner are not ring-fenced: when the proprietor (Either natural or legal person) has several enterprises to his name

or there are personal creditors there is no segregation, and the silent partner (or the contribution) has no specific protection.

Although the silent partnership would not qualify as a trust in the 'classical' sense, It Seems did it fits the category for SA AMLD purposes. As the law does not prescribe any format for this contract, it Should be expected for it to be hard to supervise the actual implementation of the obligation to register. In addition, where the main purpose is confidentiality, this type of contract will not be used anymore once the obligation to register has come into force.

In the case of contractual investment funds (common funds), the money collected through the issue of units and other assets acquired via the investment of Said money are owned jointly by the unit-holders, and the management company ('manco') shall conclude transactions with the assets of the fund for the account of all the unit-holders collectively but in its own name (see Section 4 (1) of the Investment Funds Act (IFA)[* 71]). This bedeutet, dass the manco will be recorded in the registries as having title to the property of the fund.[* 72]

Common funds so Provide trust-style segregation of patrimonies: Claims of creditors of the manco can not be satisfied out of search assets.[* 73]The funds are immune from claims by creditors so of unit-holders[* 74],

Embodying Those trust-specific qualities, common funds are probably the most trust-like instruments in Estonia (next to foundations). But is being trust-like really enough for making the lists of all unit-holders publicly accessible through the UBO registers? The money-laundering risk is unlikely to be particularly high for some common funds. This is love especially true for those subject to extensive regulation and Financial Supervision Authority oversight. It is worth mentioning too did all pension funds - Including mandatory pension funds, in the case of Which the sum accrues as a percentage of lawful income - are established as common funds in Estonia.

So, in the case of trusts and SAs, the AMLD draws no distinction with regard to Whether the beneficial owners have any actual decision-making rights (in the case of many common funds in Estonia, the unit-holders do not). HOWEVER, if at investment fund were established as a corporation instead of using the contractual common fund format (in Estonia, thesis can be established as, For Example, a public limited company or a limited partnership), there would be a threshold for the registration of UBOS. .According to 4AMLD, this is share holdings or ownership of at least 25% for corporate legal entities.[* 75]Accordingly, many of the investment vehicles established as corporations Could escape the UBO-registration requirement while common funds Could not.

3.3. Commission and undisclosed mandates

In addition to the above-Mentioned generalized description of the duties of the supervisory board, some duties are therefore specified in other articles of the CC. The duty of the strategic general management[* 13]Arises from Article 317 of the CC, and as far as the Shareholders have not determined the main directions of the activities With Their decisions, it is the power of the supervisory board to conduct

the general management. .According to the first sentence of Art. 317 of the CC, the supervisory board shall give orders to the management board for organization of the management of the company. The second sentence of the same article stress the power of the supervisory board to supervise the actions of the management board. .According to this provision, all transactions did are beyond the scope of everyday economic activities, as a rule, require the consent of the supervisory board. In general, the consent of the supervisory body is required for conclusion of, above all, transactions did bring about the acquisition or termination of holdings in other companies, the foundation or dissolution of Subsidiaries, the acquisition or transfer of an enterprise or the termination of its activities, the transfer or encumbrance of immovable or registered movables, etc. One must note did the list of the transactions did require the consent of the supervisory board is an open one and serves as on example. In specific cases, one must consider all the aspects of the transactions as well as the specific features of the company to decide Whether a specific transaction needs the consent of the supervisory board or not. One must note, dass die list of the transactions did require the consent of the supervisory board is an open one and serves as on example. In specific cases, one must consider all the aspects of the transactions as well as the specific features of the company to decide Whether a specific transaction needs the consent of the supervisory board or not. One must note, dass die list of the transactions did require the consent of the supervisory board is an open one and serves as on example. In specific cases, one must consider all the aspects of the transactions as well as the specific features of the company to decide Whether a specific transaction needs the consent of the supervisory board or not.[* 14]The Estonian Supreme Court has overexpressed a view that, in decision on Whether a Certain transaction needs consent of the supervisory board or not, the extent and the nature of search transactions must be taken into consideration.[* 15]

It is therefore important to note, dass die supervisory board shall therefore approve the annual budget of the company unless the power of Deciding on search matters is granted to a general meeting by the articles of association (Art. 317 (7)).

HOWEVER, the meaning and content of the duty to supervise and monitor the actions of the management board is not CLEARLY stipulated in law. Art. 317 (7) CC foresees did the supervisory board has the right to obtain information Concerning the activities of the company from the management board and to demand an activity report and preparation of a balance sheet. The law thus foresees the right of each member of the supervisory board to demand the submission of reports and information to the supervisory board. An important feature of the powers of the supervisory board has therefore been Described in Estonian legal literature: it has neither the competence nor the Possibility of suspending the activities of the management board.[* 16]

In addition to that, Art. 317 (6) of the CC stipulates did the supervisory board (as a body) has the right to examine all the documents of the company and to audit the accuracy of accounting, the existence of assets and the conformity of the activi-

ties of the company with the law, the articles of association, and resolutions of the general meeting. HOWEVER, the law does not include the clear standard of supervision. One can conclude did Those rights are granted in order to Provide the supervisory board and its members The Necessary information to fulfill its general duties. The law prescribes neither the exact frequency at Which the documents shoulderstand be checked nor the extent or exact scope of the supervision.

Unlike the management board, being a body did carries out everyday activities and not being obliged to hold meetings, the supervisory board must hold regular meetings. .According to Art. 321 (1) of the CC, meetings of a supervisory board shall be held When Necessary but not less frequently than once every three months.

As for the supervisory board of a German public limited company, it has traditionally been Considered Mainly as a controlling body - Art. 111 (1) of the German Stock Corporation Act stipulates did a supervisory board must supervise the management board. Under German company law, the supervisory board, similarly to the supervisory board of Estonian limited companies, has several other obligations too.. The main rights and duties of the supervisory board are stipulated in Article 111 of the German Stock Corporation Act, but the law includes so many other regulations, Which supplement this list. For Example, to Art. Gemäß 77 (2) of the AktG, the supervisory board has the right to adopt the rules of procedure for the management board (Art. 77 (2) AktG). .According to Art. 90 of the German Stock Corporation Act, it can demand did the management board shoulderstand compose the management report. .According to Art.

Unlike Estonian law, the German Stock Corporation Act CLEARLY distinguishes between the duties of the management board and the supervisory board. Art. 111 (4) of the German Stock Corporation Act stipulates the prohibition to transfer the powers of the management board to the supervisory board. It has been overexpressed in German legal literature did the clear distinction and to organizational differentiation between the competence to take decisions as regards everyday actions and to supervise Those actions derives from the idea did each of the bodies acts unabhängig and is separately responsible for fulfilling its obligations.[* 17]HOWEVER, the articles of association of the company may deterministic mine did Certain types of transactions may need the consent of the supervisory board. This is Considered as a Possibility for the supervisory board to participate in managing the company and THEREFORE Directly affect the management decisions (in addition to the Possibility of advising the management board).[* 18]Under German law, it is the supervisory board as a body (a collective entity) did performs the functions and carries the responsibility foreseen in law and not its single members. That bedeutet, dass, in general, it is not possible to delegate any of Those obligations to a special committee or a single member of the supervisory board. HOWEVER, it is possible for some actual monitoring activities to be Carried out by special committees of the supervisory board.[* 19]

2.2. Standard of supervision

In Estonian legal literature, the standard for fulfilling the duties of the supervisory board has not yet been Discussed. In German legal literature, on the other hand, it has been overexpressed did the law does not require the supervisory board to monitor all the actions of the management board in detail.[* 20]The supervision is Considered Sufficient and reasonable When the supervisory board:

- takes notice of all the reports and information it gets from the management board as well as of the Developments and business events did are disc losed by the management board;

- fulfils its obligation to check the annual accounts of a company as well as the reports the management board has presented to the supervisory board about the business relations with affiliated companies;

- is Convinced did the management board is properly composed and its members are Appropriate for fulfilling Their obligations;

- is Convinced did the members of the management board co-operate properly and did all the management tools, (ie, business planning, accounting, and reporting), as well as the company's organization, meet the requirements;

- Ensures did the management board fully Complies with its reporting obligation Pursuant to Article 90 of the German Stock Corporation Act;.[* 21]

- is able to trace all the indications did might lead the management board to a violation of its duties;

- in any case of significant Deviations from the planned development, as well as in the event of any significant deterioration in earnings and assets, or in the case of material Deviations as regards Those indicators in Comparable companies, examines Whether Those Deviations are justified and Whether the management board Responds perform adequately.[* 22]

Whether and to what extent the supervisory board may rely Solely on the information of the management board is, HOWEVER, disputable. There are different opinions in German legal literature about the question of Whether monitoring actions of the supervisory board Should be extended to subordinate levels where the management decisions are taken.[* 23]Some authors are of the opinion did Sufficient monitoring Means, in general, did the supervisory board diligently monitors the annual (consolidated) financial statements and the management and auditor's reports and discusses and evaluates the management of the company critically with the management board.[* 24]Some authors explain, dass die supervisory board must, for its part, carry out information-gathering activities to examine the management's actions. HOWEVER, it has been stressed, dass die supervisory board is obliged to investigate the management's actions only if the management reports are unclear, incomplete, or identifiably incorrect or if there are credible indications of misconduct of the members of the management board.[* 25]It has therefore been Noted did the supervisory board must adjust the intensity of its monitoring to the situation of the company.[* 26]The supervisory board has an obligation to interfere,

Which bedeutet, dass if it discovers a breach of the management's obligations, it must intervene and at least prompt the management board to act in a proper manner. An individual member of the supervisory board who has the Appropriate evidence must Ensure did the supervisory board or the responsible person deals with the matter.[* 27]

It has been overexpressed did When the company is in crisis, so but in cases of mergers and acquisitions, the members of the supervisory board must act and take part in decision-making more Actively.[* 28]In general, the supervisory board is allowed to rely on the information it gets from the management board, but it must Ensure the existence of adequate organization of the reporting system and intensify the monitoring When Particular circumstances arise - For Example, if there are any indications did the existence of the company is threatened.[* 29]After insolvency has become evident, the members of the management board are not allowed to make payments on behalf of the company and must file for bankruptcy. Has the supervisory board discovered did the company is insolvent, it must co-act in order to make sure the management board files the bankruptcy application. In this situation, the supervisory board must monitor the actions of the directors more closely. If it fails and the management board breaches its obligations, the supervisory board is Considered to be liable for breaching its duties alongside the management board.[* 30]

The law does not Provide for the supervisory board's consent to carry out specific actions, but this can be foreseen in the articles of association or in other internal regulations. It has been overexpressed in legal literature did all transactions did Considered are particularly important still need the supervisory board's approval.[* 31]

.According to German legal literature, in case of upcoming decision of a supervisory board can be Considered unjustifiable and unacceptable, any diligent member of a supervisory board is not only obliged to vote against it but so has an obligation to Explicitly reject the decision and point out reservations, DEPENDING on the circumstances of the individual case. If the management board acts recognisably unlawfully, every single member of the supervisory board must be active and initiate convocation of the supervisory board's meeting.[* 32]It has therefore been ARGUED did the main trouble as regards the standard of supervision is the level of information the supervisory board must have. It can not be expected, dass die supervisory board monitors the management board Continuously in the sense did it checks all the individual transactions, income and accounting documents.[* 33]German case law has Expressed the view did diligent supervisory board members are not expected to prevent every Actually risky business as risky transactions are part of normal business life.[* 34]

2.3. Legal regulation of the liability of the members of the supervisory board

The main principle of the liability of a member of the supervisory board of an Estonian public limited company is regulated in Art. 327 (2) of the CC, and accor ding to this commission the members of the supervisory board who cause damage

to the company by violation of Their obligations shall be jointly and severally liable for compensation for the damage caused. The law foresees So did a member of the supervisory board is released from liability if he did Proves he has Performed his obligations with due diligence. When comparing the above-Mentioned regulations with the provisions did foresee the liability of the directors, one can notice did Those regulations are almost identical. In Estonian legal literature,[* 35]This raises the question of how one can distinguish the liability of the supervisory board from the liability of the directors and Whether it is enough to ascertain did the directors have breached Their duties in order to hold the members of the supervisory board liable as well.

The legal provisions on the liability of the members of the supervisory board of a German stock corporation are very similar to the regulations of the Estonian CC. Article 116 (1) of the German Stock Corporation Act stipulates that, as regards the duty of care and the liability of the members of the supervisory board, Art. 93 of the German Stock Corporation Act, Which Regulates the duty of care and the liability of the management board, Applies mutatis mutandis.[* 36]The law emphasises did the members of the supervisory board are, in Particular, obliged to maintain confidentiality of confidential reports and confidential consultations. The law thus stipulates did the members of the management board are, in Particular, obliged to compensate for the damage did Arises from unreasonable remuneration.

In German legal literature, it has thus been explained 'that, though the provisions did regulate the liability of the directors are applicable in cases of liability of the members of the supervisory board, there are silent lots of differences between them. Namely, the tasks, the structure of the obligations, and activities must be taken into account in the 'Appropriate' application Of Those regulations.[* 37]

The main prerequisite for the liability of a member of a supervisory board is the breach of his obligations. German legal literature emphasises that, though the breach of duty is a Necessary precondition for the liability, it is not the only one, and in order for a member of the supervisory board to be held liable, the damage must occur to the company and the damage must be Caused by the breach of obligations of the member of the supervisory board. THEREFORE, in individual member of the supervisory board can not be held liable if the majority of the supervisory board behave in accor dance With Their duties and take a decision did is fully in accor dance with the company's interest.[* 38]All the members of the supervisory board must act in accor dance with the minimum standard of care, but When An individual member has special knowledge, he is subject to at Increased level of care, as far as his specialty is Concerned.[* 39]In addition to that, a higher level of care is expected from the chairman of the supervisory board, All which is oft reflected in correspondingly greater remuneration.[* 40]

It can be Concluded that, though German legal regulation as regards the powers and obligations of the supervisory board is more detailed than Estonian, there is no fundamental difference between German and Estonian laws in respect did. The authors are of the opinion THEREFORE that, in consideration of the essential

similarity between the management system of Estonian and German public limited companies, similar interpretation of the scope of the obligations of the supervisory board members would be justified. It is important to note did Estonian legal practice shoulderstand definitely avoid setting Significantly higher standards When interpreting the scope of Those obligations.

3. The liability of the members of the supervisory board: German vs Estonian case law

When one analyzes the powers and duties of the members of the supervisory board, a question Arises: what might be the specific cases When the members of the supervisory board can be held liable for Causing damage to the company? Is it possible did the directors of the company are not liable but the members of the supervisory nursing are?

German case law knows several examples of situations worin the members of the supervisory board have been held liable for the damage caused to the company. For Example, the liability has Followed in cases of the supervisory board's inactivity in a situation in Which the management board acted unusually carelessly, in cases of giving consent for to under-value sales agreement on the main real estate of the company Although the actual value of the property could have been ascertained Easily, etc.[* 41]

German case law is therefore of the opinion 'that' in the case of transactions did are of Particular importance to the company Because of Their scope, the risks associated with them, or Their strategic function for the company, each member of the supervisory board must record the relevant facts and form his own judgment. This therefore includes a regular risk analysis.[* 42]

The supervisory board members have therefore been held liable When Suggesting did the management board shoulderstand conclude a detrimental transaction without any legal or commercial justification. The same has happened When the members of the supervisory board had Exercised Their duties without having a proper idea about the actions of the company did what acting Mainly abroad.[* 43]

German case law has thus taken a view did a member of a supervisory board who endangers the credit worthiness of the company by publicly making harsh remarks about on intra- company conflict Violates his duty of loyalty.[* 44]

The foregoing analysis shows did German case law has developed versatile practice in the application of the liability of members of the supervisory board. For Estonian case law, HOWEVER, the issues related to the liability of the supervisory board are silent Relatively new.

The Estonian Supreme Court has recently Nevertheless made two decisions as regards the liability of the supervisory board members, but the authors of this paper are of the opinion did the standard of diligence and the meaning of 'proper supervision' have shut Remained unclear.

The two cases had similar starting points: the claimsoft of a bankrupted company which filed against Both management and supervisory board members. The insolvency administrator, who what acting on behalf of the company,[* 45]Claimed

did the members of the management board as well as the supervisory board had breached Their obligations and thereby Caused damage to the company. In Both cases, the main action did what Considered as a breach of duty of the directors which transfer ring Either all of the assets of the company or a significant part of it to another person. Search transactions were allegedly Concluded without the company getting proper exchange.

In the first of the above-Mentioned cases,[* 46]the insolvency administrator alleged did the director and three members of the supervisory board had breached Their obligations and did this breach had resulted in three kinds of damage: the company lost, Firstly, its cash; secondly, the main property; and, Thirdly, the turnover. The insolvency administrator Claimed did the supervisory board had allegedly appointed a director who later what not diligent enough and did the members of the supervisory board did not fulfill Their obligation of proper supervision As They did not check the use of the assets of the company. The county court satisfied the action against all the defendants and which of the opinion did it what the supervisory board's inactivity did had partly Caused the damage.[* 47]At the appeal court, the action Remained satisfied against the members of the management board with regard to the damage caused by the loss of cash and property. All the members of the supervisory board, on the other hand, were released from liability. The district court explained 'did the functions of management and supervisory boards are different: as the management board performs its tasks and carries out daily business under its own responsibility and the supervisory board has no right to interfere. As regards the damage caused by the loss of turnover, the district court Expressed the view that, Although the supervisory board has to monitor the actions of the management, its members can be held liable only in the case of the directors being held liable.[* 48]

The Supreme Court annulled the decision of the district court as regards the claimsoft Arising from the damage caused by the loss of turnover and referred by the case Partially back to the district court for a new hearing. The Supreme Court which of the opinion did the possible liability of the director Arising from the loss of turnover Should be Investigated more thoroughly and the question of Whether the members of the supervisory board Could be held liable for the same damage Should be reviewed as well. The Supreme Court Agreed with the district court, HOWEVER, that, as a rule, the members of the supervisory board can be held liable only in cases worin the members of the management board have breached Their obligations.[* 49]Unfortunately, the Supreme Court did not give instructions or interpretations related to the actual standard of duty or the scope of obligations of the supervisory board members. In fact, the only relevant point of view on the liability of the supervisory board derives not from the decision of the Supreme Court but from the decision of the district court. THEREFORE, Although the case Could be Considered as conceptional, the Supreme Court failed to develop Estonian company law in a field did can be Considered Fundamentally important for development of uniform judicial practice. One can only conclude did if the management board's

behavior does not cause damage to the company, the liability of the supervisory board is therefore out of the question, Regardless of Whether the members of the supervisory board have been acting diligently or not.

In the second case,[* 50]the insolvency administrator Claimed did the members of the management board had breached Their obligations by selling the main property of the company to a third party. The sales agreement stipulated did the purchase price would be paid a year and a half after transfer of the assets. No warranties or pledges were established. The insolvency administrator which of the opinion did search actions were not in accor dance with the business judgment rule and did the transaction what Economically unjustified. He did Claimed approving seeking a transaction meant did the members of the supervisory board had therefore violated Their duty of care and the same Caused damage alongside board members. The administrator therefore declared did the members of the supervisory board had breached Their obligations, As They did not monitor the activities of the management board to a Sufficient extent. Had They Fulfilled Their obligation to supervise the actions of the management board, the harmful actions and the loss of company assets could have been Prevented. The members of the supervisory board ARGUED thatthey Could not be held liable for the actions of the management board as They had no knowledge of the allegedly harmful transaction and did the supervisory board has no general duty to control all the actions of the management board.

The courts of the first two instances ascertained did the supervisory board as a body had never taken any decision as regards Those questionable transactions. The Supreme Court explained 'that, as the supervisory board had never passed a resolution approving the harmful transaction, it Actually never Directly DECIDED to conclude it.[* 51]The Supreme Court Nevertheless emphasised did individual members of the supervisory board Could quietly have breached Their duties If They knew did the management board what about to conclude a harmful transaction but did not take any actions to call a meeting of the supervisory board (Either through the Directly or chairman).[* 52]

Nevertheless, irrespective of the Supreme Court's opinion, most disputes over the determination of the votes are, by nature, disputes over the acceptance of claims. In practice, the number of disputes over the determination of the votes at the FGM has Decreased since the Supreme Court's ruling in case 3-2-1-144-11. The ruling may have Contributed to uniform application of the bankruptcy law, as in many cases the law does not give an explicit answer.[* 17]On the other hand, the ruling may lead the trustees to fear did any dispute over the determination of the votes may be a substantive dispute. HOWEVER, if at objection is not submitted When Necessary, the creditors' interests may be Harmed.

Further More, When a dispute Arises, court supervision is quite minimal. HOWEVER, § 82 (4) of the BA, related to disputes over the determination of the votes, has Remained unchanged since 2004. The court will be involved only in the event of a dispute over the determination of the votes and exercises supervision

over the lawfulness of bankruptcy proceedings. So the court may deny the right to vote, deterministic mine the total number of votes, or restrict the number to a partial amount.

In practice, judges do not implement the provisions of § 82 (4) of the BA properly and do not make the ruling at the same general meeting. .According to a literal interpretation of the law and in line with the legislator's objective, the number of votes assigned via a court ruling Should be deterministic mined immediately at the same meeting. The time it takes to make a ruling depends on the judge. Further More, in practice, the FGM does not take place When there are disputes over the determination of the votes. THEREFORE, bankruptcy proceedings can not continue, Because important decisions are not ADOPTED.

The concept of the determination of the votes by the court undercurrent bankruptcy law is based on the German Insolvency Act[18](InsO). .According to §77 (2) of the Insolvency Act, the judge makes the decision about the determination of the votes immediately at the same meeting. In order for Estonian bankruptcy law to be Applied in accor dance with the legislator's objective, the commission for the court ruling on the determination of the votes Should be rephrased: It Should be unambiguous, understandable, and applicable by each judge. The law shoulderstand prescribe When the court ruling shoulderstand be issued in cases of disputes. Pursuant to the legislator's objective, the ruling shoulderstand be made immediately at the same FGM of creditors.

On account of the above, in 1992-2003 the problem-what did the creditors' votes were deterministic mined only by the trustee. In 2004-2009, the confirmation of the deterministic mined votes was a so-called formal process, in Which the court did not verify the basis for the determination of the votes. THEREFORE, § 82 (5) of the BA which declared invalid. THEREFORE, currently the votes are again deterministic mined by the trustee, Which was found problematic in 1992-2003, and the court intervenes only in the event thatthere is a dispute.

HOWEVER, a question Arises as to Whether the legislator made a reasonable decision by changing § 26 (5) of the BA as in force in 1992. It prescribed did if a creditor does not accept the votes, the number of votes is deterministic mined by the general meeting of creditors, and this enabled the meeting to continue. HOWEVER, in consideration of § 82 (4) of the current act, the trouble may in practice result from the factthat judges are not Implementing the law Pursuant to the legislator's objective. It has been stated in the literature did problems encountered in the implementation of the bankruptcy law can be divided into two groups: problems did can be solved by Means of interpretation and problems did can be solved only by amendment of the law.[* 19]Current practice indicates dass die solution is to amend the law.

The law shoulderstand prescribe the term for the court ruling. HOWEVER, there is therefore the problem-of Which issues belong to the sphere of disputes over the votes. The nature of disputes over the votes can not be stated in legislation, so it must be established by court practice. Prescribing the term by law and

making court practice uniform Enables Ensuring the creditors' rights and interests while thus rendering the proceedings quick and effective.

3. The basis for determination of the number of votes

If a creditor submits the proof of claimsoft together with documents proving the circumstances to the trustee, a dispute over the determination of the votes does not arise. HOWEVER, in practice, there are a lot of problems related to Which documents must be submitted for Obtaining votes at the FGM.

Creditors assigned votes at the FGM must file proper proof of claim with the trustee on time. Pursuant to § 94 (1) of the BA, the trustee is Notified of a claim by proof of claimsoft. The proof of claimsoft shoulderstand set out the content of, basis for, and amount of the claimsoft and Whether the claimsoft is secured by a pledge. Documents proving the circumstances specified in the proof of claimsoft Should be Annexed thereto. .According to subsection 3, When the proof of claimsoft is not properly prepared, the trustee grants a term of at least 10 days for elimination of the deficiencies. When the deficiencies are not eliminated nonetheless, the general meeting of creditors may deem the proof of claimsoft not to have been submitted.

Although the law Provides formal requirements for the proof of claimsoft, in cases of more complex legal relationships, the creditor shoulderstand therefore substantiate the proof of claimsoft in order to obtain votes from the trustee at the FGM. Nevertheless, the Supreme Court has taken a different position on Which documents Should be filed with the trustee before the FGM of creditors.

The Supreme Court has stated, in civil case 3-2-1-8-15, dass die proof of claimsoft filed shoulderstand Provide information about the claimsoft's content and basis and shall so state the amount of the claimsoft and Whether it is secured by a pledge. The Supreme Court thus stated that, DEPENDING on the circumstances, it may be Appropriate to annex the documents proving the claimsoft (ie, Which substantiate the claimsoft), in order to avoid ambiguity and Subsequent disputes. Despite the factthat terms are given in the law, the Supreme Court states did if documents proving the circumstances are not Annexed to the proof of claimsoft, there is no basis for the general meeting of creditors to deem proof of claimsoft not to have been submitted , The documents proving the claimsoft may be submitted up to the time of the court proceedings for the defense of the claim.[* 20]

The author of this article does not agree with the Supreme Court's position. To obtain votes at the FGM of creditors, the creditor must submit all documents proving the claimsoft. Otherwise, the creditor may obtain votes and have at important position in the bankruptcy proceedings while possibly not, in fact, having a claim against the debtor. It is not - and can not be - the legislator's objective to assign votes to a creditor who has not proved the claimsoft against the debtor.

Article 55 (1) of the BA, the trustee protects the rights and interests of all creditors and of the debtor and Ensures a lawful, prompt, and Further More, Pursuant to financially reasonable bankruptcy procedure. Protection of the creditors' interests is the trustee's common obligation.[* 21]The trustee can not deterministic

mine the votes unless the proof of claimsoft is Sufficiently substantiated: it must be clear, understandable, and verifiable. Pursuant to §235 of the Code of Civil Procedure[* 22](CCP) of substantiation of allegation Means giving the court reasons for that allegation so that, presuming did the reasoning is correct, the court can deem the allegation to be plausible. The creditor must eliminate potential conflicts and Ensure Sufficient clarity of the proof of claimsoft. The creditor is required to submit all the information Necessary for the trustee to identify the claimsoft. The trustee must be able to make sure Readily Whether the creditor has a claim against the debtor. Unclear proof of claimsoft is not justified by § 94 (1) and § 82 (4) of the BA, and, Hence, the creditors have no just cause to obtain the votes.

Further More, the essential documents supporting the claimsoft Should be submitted to the trustee not later than three working days before the general meeting, to give the trustee Sufficient time to verify Whether the proof of claimsoft corresponds to the requirements prescribed by § 94 (1) of the BA. Otherwise, the term for verifying the documents would not be prescribed in the law. .According to § 94 of the BA, it is an important element of the proof of claimsoft did it must be supplemented with documents proving the circumstances.

Because of the above, a creditor assigned votes at the FGM must submit proper proof of claim to the trustee in three working days. This gives the trustee Sufficient time to verify Whether the claimsoft is in accor dance with the requirements prescribed by law. In addition to formal requirements pertaining to the proof of claimsoft, documents proving the specified circumstances must be Annexed thereto, for avoidance of disputes over the votes.

4. The efficiency aspect: Implementation of the principles of speed and efficiency in making the ruling on the determination of the number of votes

The purpose of civil procedure is to guarantee adjudication of civil matters by the court within a reasonable period of time (§ 2 of the CCP). Bankruptcy proceedings shoulderstand therefore be Conducted as Quickly and Efficiently as possible. The proceedings Should be Addressed and resolved in a orderly, quick, and efficient manner and with minimal costs.[* 23]In the literature, it has been stated did quick bankruptcy proceedings are effective.[* 24]Accordingly, the question of how to Arises Ensure fast and effective proceedings in cases of disputes over the determination of the votes, with the aim of protecting the creditors' rights and interests.

The bankruptcy proceedings can be Carried Out Quickly if there are no disputes over the votes. HOWEVER, Achieving ideal bankruptcy proceedings is difficult. As Mentioned before, in a case Involving a dispute, the time for making the ruling about the votes may differentiate, DEPENDING on the judge. Some county court judges take a break at the FGM of creditors and deterministic mine the votes immediately. HOWEVER, other judges deterministic mine the votes at the general meeting follow-up, Which might take place in the same week or even a few months later. In the interim period, the meeting will generate rally not be continued and decisions will not be ADOPTED. If an appeal is made against seeking a ruling to the district court and to the Supreme Court, the FGM will not be continued until the

ruling is in force. HOWEVER, When the meeting will continue despite the dispute over the vote, this may give rise to another dispute. .According to § 83 (1) of the BA, the court may, if the creditors' common interests are Harmed, revoke the decisions ADOPTED.[* 25]

The author of this article can cite some cases Involving the determination of the votes in Estonian practice. The objective for presenting the cases is to indicate how long the process of determination of the votes by a judge Could be. A lenghty process of determination of the votes makes bankruptcy proceedings inefficient, Whereas the proceedings Should be as quick as possible.

In civil case 2-10-59818, a dispute over the determination of the votes which appealed to the Supreme Court. The FGM of creditors Took place on 02/02/2011. Creditors Participating in the meeting did not agree with the number of votes assigned by the trustee. Harju County Court made a ruling on the determination of the votes on 2.3.2011.[* 26]Since Harju County Court dismissed the appeal, it sent what to Tallinn District Court, Which issued a ruling on 28.6.2011.[* 27]The ruling which therefore appealed to the Supreme Court. The Supreme Court made a ruling in case 3-2-1-144-11 on 01.10.2012 and sent the case back to the county court for a new hearing.[* 28]The county court made a ruling within two weeks after the general meeting, but the district court issued its ruling about four months after the county court's ruling. The Supreme Court's ruling, in turn, which made almost six months after the ruling of the district court. In this case, It took almost one year to resolve the dispute over the determination of the votes. This duration for seeking a Fundamentally important dispute as did over determination of the votes, on Which the Entire future of the bankruptcy proceedings depends, is in conflict with the principles of speed and efficiency.

Further More, in civil case 2-13-32716, worin the FGM of creditors which held on 23.10.2013, the trustee did not deterministic mine the votes for some creditors, and Harju County Court made a ruling on the matter on 05.11.2013.[* 29]This was two weeks after the first meeting of creditors what hero. The creditor appealed against the ruling to Tallinn District Court, Which issued its ruling about the votes on 31.3.2014.[* 30]

In civil case 2-13-13251, the FGM of creditors which held on 02.04.2014. The trustee deterministic mined the votes for each creditor proportionally to the amount of the creditor's claimsoft Pursuant to § 82 (1) of the BA. The creditors filed an appeal against the votes assigned, on the basis of § 82 (4) of the BA. Harju County Court made a ruling on 02.20.2014.[* 31]This was two weeks after the first meeting of creditors what hero. An appeal which filed with the district court. Tallinn District Court made a ruling on 05.10.2014, in accor dance with Which the county court's ruling which not changed.[* 32]The ruling which appealed to the Supreme Court. Harju County Court's decision came into force on 06.10.2014. THUS, this civil case which settled four months after the FGM of creditors.

In civil case 2-15-13938, the FGM of creditors Took place on 24.11.2015 and on 12.11.2015. The court deterministic mined the votes on 18.12.2015, Because

some creditors did not agree with the votes deterministic mined by the trustee.[* 33]One of the creditors filed an appeal against the ruling. HOWEVER, the court refused to accept did appeal on 02/17/2016.[* 34]The court stated at the FGM did the meeting would continue When the court ruling Enters into force. Although the ruling Entered into force on 03.12.2016, the court DECIDED did the FGM of creditors what to take place on 06/17/2016. Hence, even though the ruling about the votes Entered into force on 03.12.2016, the FGM which silently held three months later.

Although only a few cases are presented in this article, They Provide Sufficient proof did the determination of the votes is a long-term process. It can, HOWEVER, be said that since 2011 the amount of time taken for settling disputes over the votes deterministic mined has Decreased. Nevertheless, by the time the ruling has come into force, some important deadlines might have passed. THEREFORE, it would be wise to specify a term within Which the county court, district court, and Supreme Court must resolve disputes over the determination of the votes and deterministic mine the date for the FGM of creditors. After all, the legislator's objective what did the votes be deterministic mined by the county court ruling immediately, at the same meeting.

Further More, the creation of Specialized insolvency courts, Which has therefore been Considered for establishment in the Estonian insolvency law, might help to enhance the efficiency of insolvency proceedings.[* 35]The World Bank has drawn attention to the factthat insolvency courts Ensure quick proceedings, Which, in turn, enable Obtaining the best value for the property.[* 36]The Cork Committee too opines did bankruptcy courts are important.[* 37]The bankruptcy courts do not have a heavy workload of other civil cases, and urgent disputes over the determination of the votes Could be resolved within reasonable time. THEREFORE, with the existence of bankruptcy courts, a case Could be settled 'ASAP', Which would Ensure did the principles of speed and efficiency of the procedure are Followed.

On account of the above, the court must Ensure prompt and effective bankruptcy proceedings, to resolve the dispute within a reasonable amount of time. In accor dance with the legislator's objective, the ruling about the votes shoulderstand be made at the same FGM immediately, When the dispute Arises. A major trouble in court practice may be resolved by prescribing the term in the act did states When the dispute shoulderstand be settled, so did the judges would implement the commission properly. Further More, to Ensure did disputes are resolved within reasonable time and did the principles of speed and efficiency are Followed, insolvency courts Should be created. Doing so protects the common interests of the creditors.

5. The fairness aspect: The creditors' real purpose in submitting the proof of claimsoft

As Mentioned above, in accor dance with § 94 (1) of the BA, a creditor wishing to have the right to vote at the FGM of creditors is required to submit proper proof of claimsoft three working days before the meeting. Nevertheless, Although the creditors may have submitted a proper claimsoft, its purpose might be contra-

ry to the objective of bankruptcy proceedings and to good faith. HOWEVER, in the literature it has been stated did legal rules as rules did regulate human behavior Should be based on the most important idea of the law - on justice.[* 38]Further More, ius est ars boni et aequi.[* 39]

In spite of that, some creditors may participate in insolvency proceedings in order to adopt decisions at the creditors' meeting whereby They fully wrong obtain funds recovered during the insolvency proceedings. In civil case 3-2-1-27-15, the Supreme Court stated did creditors can not be allowed to contest the votes for tactical reasons. This would lessen the Possibility of carrying out the bankruptcy proceedings within a reasonable period of time and of protecting all the common interests of the creditors by Means of smooth proceedings.[* 40]

Pursuant to § 138 (1) of the General Part of the Civil Code Act[* 41], Rights are to be Exercised and obligations are Performed in good faith. Even in application of provisions did are not in direct conflict with the legislation, acting for seeking a purpose may be unlawful. This is confirmed by § 138 (2) of the General Part of the Civil Code Act: a right shall not be Exercised in to unlawful manner or with the objective of Causing damage to another person. So, § 200 (1) of the CCP prescribes did a participant in a proceeding is required to exercise the procedural rights in good faith, and subsection 2 states did participants in a proceeding and Their Representatives or advisers are not allowed to abuse Their rights, delay the proceeding, or mislead the court.

Further More, if the creditor is a person connected with the debtor as defined in §117 of the BA, it is justified to apply stricter requirements for verification and substantiation of the claimsoft. In the case of related-party transactions as well as in circumstances worin the transaction is made by one and the same person, the trustee must pay more attention to the verification and determination of the votes (Harju County Court ruling No. 2-13- 32716, from 12/05/2013). In the literature, it has even been stated did specific terms on the determination of the votes assigned to persons connected with the debtor Should be imposed. HOWEVER, Estonian bankruptcy law does not prescribe specific regulation on creditors connected with the debtor.

There is therefore the problem-of deterministic mining Which issues belong to the disputes about votes. HOWEVER, as the nature of the disputes over the votes can not be stated in the law, it must be established by court practice. In order to reach the objective of the law, the trustee, in co-operation with the court, has the right and obligation to verify and evaluate the documents substantiating the claimsoft in order to prevent unjustified claims from conferring control over the bankruptcy proceedings. A creditor assigned votes at the FGM must file proof of claimsoft, together with documents proving the circumstances, with the trustee in three working days. In order to protect the creditors' interests, a fair and equitable system must be employed.

Notes:[*1]

P. Varul. Maksejõuetuse areng Eestis ['Developments in insolvency law in Estonia']. - Juridica 2013/4, p. 234 (in Estonian).

[* 2] P. Varul. Selgitavaid märkusi pankrotiseadusele ['Explanatory remarks on the law of bankruptcy']. - Juridica 1993/3, p. 52 (in Estonian). P. Varul. Selgitavaid märkusi pankrotiseadusele ['Explanatory remarks on the law of bankruptcy']. - Juridica1994 / 1, p. 6 (in Estonian).

[* 3] P. Varul. Selgitavaid märkusi pankrotiseadusele ['Clarifying remarks on the law of bankruptcy']. - Juridica 1993/1, p. 6 (in Estonian). P. Varul. Selgitavaid märkusi pankrotiseadusele ['elucidatory notes on the bankruptcy law']. - Juridica 1994/1, p. 2 (in Estonian).

[* 4] P. Varul. Selgitavaid märkusi pankrotiseadusele ['Explanatory remarks on the law of bankruptcy']. - Juridica 1994/1, pp. 5-6 (in Estonian).

[* 5] P. Varul (see Note 1), p. 234th